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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the matter of:)	
)	
PETITION TO AMEND VARIOUS)	Supreme Court No. R-20-0013
RULES OF PROCEDURE RELATED)	
TO CREATING THE VERBATIM)	REPLY
RECORD OF JUDICIAL PROCEEDINGS)	
_____)	

David K. Byers, Administrative Director, Administrative Office of the Courts, and petitioner in this matter, hereby replies pursuant to Rule 28(e)(5), Rules of the Supreme Court of Arizona.

I. Introduction and Background

Arizona, consistent with nationwide trends, is experiencing a shortage and unavailability of court reporters. Based on input from the trial courts and the Arizona Association of Superior Court Administrators (AASCA), the Arizona Supreme Court included in its strategic agenda, *Justice for the Future Planning for Excellence 2019-2024*, Goal 3: Promoting Judicial Branch Excellence and Innovation, acknowledging the need for flexibility regarding the use of electronic recording to create the record. Specifically, Goal 3 includes the section “Keeping

the Record” which states, “[w]ith a growing shortage of qualified court reporters at both the state and national level, courts are faced with the ever-increasing challenge of keeping an accurate record of court proceedings. Through emerging innovations, including digital recording and remote court reporting, we will take necessary steps to ensure courts continue to create a complete and accurate record for each and every case.”

It is in this context that former Arizona Supreme Court Chief Justice Scott Bales issued Administrative Order No. 2019-49, establishing the Arizona Task Force to Supplement Keeping of the Record by Electronic Means (“task force”). In part, the task force was charged with developing recommended changes to court rules to permit courts to create and maintain a complete and accurate court record electronically to supplement the use of court reporters and to prevent backlogs and delays in resolving disputes in the trial courts and on appeal. With the strong support of the Arizona Judicial Council and the Superior Court Presiding Judges, and input from the general and limited jurisdiction courts, Petitioner filed a rule petition on January 9, 2020 reflecting these recommended changes.

Several stakeholders submitted comments to the rule petition. Commenting stakeholders included AASCA, strongly supporting the proposed rule changes; the Maricopa County Attorney’s Office; the Arizona Court Reporters Association; the Coalition of Arizona Certified Reporters; the State Bar of Arizona; Arizona

Attorneys for Criminal Justice; other attorneys; and court reporters. This Reply addresses the predominant concerns raised by those comments.

II. Discussion of Predominant Concerns

The comments posed three predominant concerns: allowing courts to use electronic recording to capture the verbatim record in the matters listed in Supreme Court Rule 30(b)(3), which were identified by the 2005 Keeping the Record Committee; the adequacy and efficiency of electronic recording technology; and the possible lack of cost savings associated with expanding the permissible use of electronic recording.

A. Expanding Electronic Recording

Several comments raised concerns regarding allowing electronic recording to capture the verbatim record in the matters listed in Supreme Court Rule 30(b)(3). The matters identified in this rule currently require a certified court reporter to capture the verbatim record and are as follows: (1) grand jury proceedings, (2) capital cases, (3) felony jury trials, (4) initial determination of sexually violent person status, and (5) requests for authorization of abortion without parental consent.

Most comments in opposition to allowing electronic recording in these matters cite the 2005 Keeping the Record Committee's findings that a court reporter should be required due to the nature and importance of the proceedings. Most

comments also indicate that nothing has changed since 2005 that would warrant allowing electronic recording as a means to capture the verbatim record in these matters.

The Keeping the Record Committee convened in 2003 and issued its report and recommendations in 2005, or 15 years ago. It is undisputable that many things have changed in the past 15 years, including exponential advancements in electronic court reporting technology. These advancements have improved and will continue to improve the quality and reliability of electronic recordings; the long-term, safe storage of the court record; remote access to the recordings; and integration of recording systems with other components of a modern, efficient electronic courtroom.

Courts must harness the availability of technology and the ways it can be applied so that cases can be resolved as efficiently as possible. A number of states, such as Utah, Alaska, Indiana, New Hampshire, Oregon, and Vermont use electronic recording to capture the verbatim record in all or most of their general jurisdiction court sessions. In some jurisdictions, the electronic recording has been the primary, and in some instances the sole, means of making the official court record for many years.

Moreover, the COVID-19 health emergency has brought the need for this type of forward-thinking, to deploy the use of technology for remote court hearings and

electronic recording of court proceedings, to the forefront for Arizona's courts. During this crisis, Arizona's courts have acted to protect the health and safety of participants, the public, and court employees, while ensuring constitutional and statutory obligations.

The pandemic has required courts to move most proceedings to virtual platforms and through a series of administrative orders¹ issued by Chief Justice Robert Brutinel, the courts have been authorized to capture the verbatim record for most all proceedings through the electronic recording functionality of these platforms. The proposed rule changes will allow trial courts this same level of flexibility, thus ensuring that cases can continue to move through the litigation process without delay in instances when a court reporter cannot be present due to unavailability or in unforeseen circumstances, such as a worldwide pandemic.

B. Adequacy and Efficiency of Electronic Recording

Petitioner does not dispute that the matters listed in Supreme Court Rule 30(b)(3) are important matters and capturing a verbatim record is of the utmost importance. Comments raised concerns about people speaking over one another or the recording picking up extraneous noises that muffle speakers. However, technology has advanced such that multiple channels can be used for electronic recording, allowing voices to be separated in playback of the recording, if one

¹ Administrative Orders 2020-60, 2020-70, 2020-75, and 2020-79.

person is speaking over the other or if extraneous noise that makes it difficult to hear the speaker who is recorded. Many of the technological constraints that were problematic decades ago have been resolved and should no longer be considered areas of concern.

Comments also expressed concern about the lack of a backup of the recording if the main system malfunctions. Petitioner is confident that judges and courtroom staff who use electronic recording to capture the verbatim record, as a matter of court policy and standing operational procedures, will make it a priority to ensure that there is a staff person to monitor the system while it is recording and to ensure that quality of the recordings. Additionally, technology is such that backup systems are put in place to ensure that the entire record is not lost in the event of an outage or malfunction and that recordings are safely stored, through the use of remote and redundant records storage, automated system monitoring, and controlled access to records storage systems.

The task force also recommended that education efforts regarding electronic recording include all involved in the judicial system, including court staff, counsel, parties, and judicial officers. To that end, best practices information will be included in judicial training and in Bench books promulgated by the Administrative Office of the Courts for use by judicial officers.

Additionally, changes to legislation, endorsed by the Arizona Judicial Council, were proposed so that any changes to court rules would align with the Arizona Revised Statutes. Comments suggest that the proposed bill did not pass the legislature due to the legislature's position that electronic recording should not be the means by which the verbatim record is captured in certain matters. This does not accurately reflect the reason that the bill did not yet pass, nor does it accurately reflect the position of the legislature.

Since the proposed bill has not yet passed due to interruptions in the legislature as a result of the COVID-19 pandemic, the requirement that a court reporter be appointed for grand jury proceedings remains current law. Accordingly, Petitioner recommends that the Court adopt the proposed rule changes, with the requirement that a certified court reporter be present for grand jury proceedings remain in Supreme Court Rule 30(b)(3).

Lastly, comments expressed concern with permitting authorized transcribers to transcribe the official record in lieu of a court reporter because authorized transcribers are not governed by a code of conduct. However, one of the task force's recommendations is to develop a separate code of conduct to govern the work of contract workers who provide transcription or electronic monitoring services. The expansion of the Arizona Supreme Court's policy on Digital Recording of Court Proceedings could include a provision requiring adoption of

the code of conduct for contract employees in all vendor contracts for electronic recording services. Pending the establishment of such a code, the ethical conduct of transcriptionists and other persons involved in the making and preservation of the electronic record can and would be governed by contractual service terms and other administrative means, including state and local level court provisions for quality control and integrity of the record keeping process.

C. Cost Savings

The task force was not established to develop recommendations for cost saving measures regarding the creation of the verbatim record. The task force was established because there is a shortage of court reporters in Arizona and courts are being forced to schedule out or reschedule hearings due to the unavailability of court reporters.

The task force's charge was to identify rule changes that would allow courts to *supplement*, not replace, court reporters. Accordingly, a cost analysis was not conducted, nor was it the focus of task force meetings.

That said, the presiding judges and court administrators of the Superior Court of Arizona have expressed concerns about the high costs incurred when a court reporter is not available in the county, thus requiring the court to secure the services of a reporter from outside of the county. In this situation, the court incurs additional costs for the out-of-county court reporter's travel and minimum per

diem rate. Additionally, and of great concern, the courts and justice system stakeholders are unable to operate efficiently when court hearings are postponed due to unavailability of a court reporter. For criminal cases involving in-custody defendants, such delays may result in additional jail time pending the next hearing for which a court reporter can be available. Such delays can be minimized or eliminated through the availability of electronic recording to make the court record, as provided in the pending rule petition.

III. Conclusion

Petitioner appreciates the comments stakeholders submitted during the comment period and deems it important to file this Reply to address the concerns reflected in the comments. Based on the foregoing responses and the pressing need to provide trial courts flexibility in making the official court record, Petitioner respectfully requests that the Court adopt the proposed rule changes, with the exception that the requirement for a certified court reporter to be present for grand jury proceedings should remain in Supreme Court Rule 30(b)(3).

RESPECTFULLY SUBMITTED this 29th day of May 2020.

By /s/ David K. Byers
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